

APPEAL NO. 991091

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 26, 1999, a contested case hearing was held. The only issue before the hearing officer was:

1. Did the claimant [appellant/cross-respondent] have disability from 1-23-96 [sic, 11-23-96] to 4-12-98 resulting from the injury sustained on \_\_\_\_\_.

With regard to that issue, the hearing officer makes several findings regarding various doctors' certifications of maximum medical improvement (MMI) and impairment rating (IR) and makes a finding that claimant had disability (as defined in Section 401.011(16)) "from November 23, 1996 until April 12, 1998." The hearing officer then goes on to reach Conclusion of Law No. 5 and the "Decision" which states:

**CONCLUSION OF LAW**

5. Because no issue of MMI was certified, or added by agreement of the parties, or on a finding of good cause, it is not before the hearing officer in this proceeding.

**DECISION**

Claimant had disability from the \_\_\_\_\_ injury from November 23, 1996 until April 12, 1998. Claimant is entitled to TIBS [temporary income benefits] during periods of disability before reaching MMI. No award of TIBS can be made at this time, as entitlement is contingent on a determination of the date of MMI, an issue not before the hearing officer in this proceeding.

Claimant appeals, and after discussing the various doctors' ratings, questions why the hearing officer did not order TIBS to be paid, and asserts that "[MMI] was not at issue" and that claimant "had disability for such period and should be paid all [TIBS] owed . . . . There is no necessity to argue the issue of [MMI] . . . ." Claimant requests that we reverse the hearing officer's decision on the payment of TIBS "and order Carrier [respondent/cross-appellant] to pay benefits according to dates of disability as defined in the Decision and Order." Carrier appeals the finding of fact and conclusion of law that determined claimant had disability, arguing that the designated doctor's report "was incorrect," that a functional capacity evaluation (FCE) had found claimant "able to perform work at a 'medium duty level'" and that claimant "was able to perform a number of daily activities . . . ." Carrier asks us to reverse the hearing officer's decision on disability. Both parties respond to the other's appeal, urging affirmance of those findings which benefit their positions.

## DECISION

Affirmed in part, as reformed and reversed and rendered in part.

First, we emphasize that the issue is disability during a certain time frame. It is not MMI, the IR, whether and under what circumstances a designated doctor may amend his report, etc. Second, if we follow the hearing officer's reasoning in the above quoted decision, there can virtually never be a finding of disability ("No award of TIBS") because in most cases the period of disability comes into issue before MMI is reached. Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." That definition makes no reference to TIBS, MMI or the IR. In fact, the Appeals Panel has, on occasion, noted that disability can continue after MMI has been reached, with the amount of TIBS to be paid a separate issue.

On the merits, claimant was a truck driver and on \_\_\_\_\_, sustained a compensable injury when someone threw a strap with a large metal hook over the top of a truck, striking claimant, who was standing on the other side of the truck, on the left side of his head. The parties stipulated that carrier accepted liability for this injury. Apparently, in another proceeding, there was an extent-of-injury issue which was resolved in claimant's favor. Claimant testified that after the \_\_\_\_\_ accident, he returned to work, but apparently at some type of modified duty where he was assigned a helper to help him with heavy lifting. Claimant testified that his regular truck driving duty was heavy work because of the requirements to load and unload the truck. Claimant testified that he was terminated in March 1996 because of his compensable injury. Claimant's status between March 1996 and November 23, 1996, was not developed with the issue being disability between November 23, 1996, and April 12, 1998. Claimant testified that he had not worked during that period of time and was unable to work because of pain and the effects of his compensable injury. Apparently, surgery had been recommended at one point but was denied by the carrier until the extent-of-injury issue was resolved. Claimant testified, and the medical records support, that he had left elbow ulnar nerve entrapment surgery on February 10, 1998. Claimant testified that his condition has improved since the surgery.

Claimant's treating doctor is Dr. P, D.C. Extensive medical records from Dr. P in evidence, apparently beginning April 9, 1996, on the front have a "Work Status" line which indicates "off work" or some variance of that notation. In a work status form dated April 30, 1996, Dr. P takes claimant off work. Numerous other reports through April 7, 1997, indicate an "off work status." An FCE performed on December 13, 1996, states:

Currently, [claimant] is functioning at a medium physical demand level. . . . Therefore, at the present time, [claimant] is unable to meet his job physical demand level requirements. It is also important to note that the patient continues to experience some dizziness and feeling of instability.

The FCE concludes:

At this time, [claimant] would be unsafe and at a high risk of being injured or re-injured if he is allowed to return to his present job. However, should the patient be allowed to return to work at this time we recommend that certain lifting restrictions in accordance with the patient's job description capabilities be strictly implemented in order to reduce the risk of being injured or re-injured on the job site. At the conclusion of the 4-6 week work hardening program, [claimant] should be retested in this facility to further assess his functional capabilities and return to work status.

There is no medical evidence to the contrary on ability to obtain and retain employment. Carrier defends on the basis that claimant does not have disability because he is at MMI and attempts to incorporate supplemental income benefits (SIBS) criteria that claimant does not have a total inability to work.

As defined in the statute, disability is the inability to obtain and retain employment at the preinjury wage due to the compensable injury. While the claimant has the burden of proving he has disability as defined, case law has established that claimant may prove disability based on his testimony alone, if believed. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Whether disability exists is generally a question of fact for the hearing officer to resolve. A conditional or light-duty release is evidence that disability continues and a claimant under a light-duty release does not have the obligation to look for work or to show that work was not available. See Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997. Further, the claimant need only prove that the compensable injury was a cause of the disability. We find sufficient evidence to support the hearing officer's finding that claimant had disability beginning November 23, 1996. The ending date of the disability, April 12, 1998, is somewhat more problematical in that it appears the April 12th date is the date when the designated doctor, in one of his reports, certified that claimant was at "the statutory MMI date." As we have taken great pains to point out, neither MMI nor statutory MMI necessarily ends disability, although it may end entitlement to TIBS (Sections 408.101 and 408.102). However, claimant, in his testimony, adopted the April 12, 1998, MMI date, stating that he was unable to work and was unemployed from November 1996 through April 12, 1998. The hearing officer could adopt that testimony as being the ending date of disability. The hearing officer's Conclusion of Law No. 4 recites that claimant had disability "from November 23, 1998 [sic, evidence supports 1996] until April 12, 1998." We affirm the hearing officer's findings and decision on disability with the exception that we reform Conclusion of Law No. 4 to conform to the evidence being the beginning date of November 23, 1996.

With regard to the hearing officer's Conclusion of Law No. 5 and decision, we reverse so much of those determinations that reference a requirement that MMI be certified and/or that TIBS be awarded, as issues not before the hearing officer, and as being totally unresponsive to the only issue before him. We render a new decision that disability, having been affirmed, carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, to include Sections 408.101 and 408.102 and the Texas Workers' Compensation Commission rules. Accrued but unpaid income benefits, if any, are payable in a lump sum with interest.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Judy L. Stephens  
Appeals Judge